Malaysian Newsprint Industries Sdn Bhd v Bechtel International, Inc & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–364 OF 2006
ZAINUN ALI, JEFFREY TAN AND TS NATHAN JJCA
21 OCTOBER 2009

Arbitration — Stay of proceedings — Dispute — Agreement extended through series of six proposals — When proposal was accepted — Whether sixth proposal existed — Whether proposals dispute arose from performance of technical services agreement or from performance of sixth or any of proposal

This was an appeal by the appellant against the stay of proceedings that was initially obtained by the respondents under s 6 of the Arbitration Act 1952 at the court below. The parties had entered into a technical services agreement ('TSA') on 30 July 1996 where the respondents agreed to provide 'project services' for the appellant's project in Mentakab. Article XIII of the TSA prescribed that any arising dispute between the parties would be resolved through good faith negotiations, failing which, after 30 days, the last resort would be mediation. Although the said project services were due to conclude on 30 September 1996, the parties negotiated in September 1996 where six proposals were submitted by the respondents for an extension until late January 1997. The respondents had sent a draft proposal and schedule of the rates/cost by a letter dated 11 September 1996. This was followed by two revised proposals dated 20 September 1996 and 25 September 1996. The three proposals stated that 'this assignment shall be subordinated to the [TSA] … ' and the respondents also informed the appellant that they were unable to maintain their personnel on the project after 1 October 1996 without a confirmation that they would be reimbursed. The appellant confirmed through a facsimile reply on 1 October 1996 and indicated that they would continue to engage services of the respondents 'on the same terms and conditions as detailed in the previous TSA'. The respondents submitted the fourth proposal on 14 October 1996, referring to a discussion held on 14 October 1996 which indicated the subordination of the assignment to the TSA. The next day, the appellant confirmed engagement of the respondents and requested them to submit a modified proposal. The respondents complied and still, reference to the assignment being subordinated to the TSA was made. However, in the sixth proposal which was sent on 31 October 1996, there was no mention of the subordination of the TSA. Learned counsel for the appellant submitted that the appellant had accepted the sixth proposal on 2 November 1996, 4 November 1996 and 5 November 1996. The appellant further contended that the dispute arose not from performance of the TSA but from

the performance of the sixth proposal where there was no arbitration agreement. Conversely, the respondent submitted that the terms and conditions of the TSA applied as the appellant had accepted the third proposal. The issue before the Court of Appeal was whether the arbitration clause in the TSA applied to the extended period of the project services.

Held, dismissing the appeal with costs:

(1) The agreement was reached bit by bit. There was only one proposal as the so called proposals that came about were revisions of that one proposal, to incorporate details and other fine points agreed in the ongoing negotiations as the respondents continued to provide project services beyond the TSA without a formal agreement. The documents when wholly taken and considered signified that the parties had the understanding that the project services for the extended period were subordinated to the TSA. Hence, the appellant was estopped from denying the arbitration agreement. Regardless of the absence of the said subordination clause in the sixth proposal, the big picture was that the appellant had agreed to arbitration (see paras 13–14).

(2) In any event, the absence of the subordination clause in the sixth proposal could not come to the appellant's assistance. The dispute arose, whether partly or wholly, from performance of project services for the extended period from October 1996 to 16 January 1997 under the first five proposals where there was a clear written submission by the appellant to arbitration. The dispute which was clearly caught by the arbitration agreement in the TSA should have been submitted to arbitration, just as the appellant had expressly agreed with the respondents (see paras 15–17).

[Bahasa Malaysia summary

Ini merupakan rayuan oleh perayu terhadap penggantungan prosiding yang pada mulanya diperolehi oleh responden-responden di bawah s 6 Akta Timbangtara 1952 di Mahkamah Tinggi. Pihak-pihak telah memeterai perjanjian perkhidmatan teknikal ('TSA') pada 30 Julai 1996 di mana responden-responden bersetuju untuk menyediakan perkhidmatan projek untuk projek perayu di Mentakab. Artikel XIII TSA menetapkan bahawa apa-apa pertikaian yang timbul antara pihak-pihak akan diselesaikan melalui rundingan niat baik, yang mana jika gagal selepas 30 hari, langkah terakhir adalah mediasi. Walaupun perkhidmatan projek tersebut sepatutnya disimpulkan pada 30 September 1996, pihak-pihak berunding pada bulan September 1996 di mana enam cadangan telah dikemukakan oleh responden-responden untuk tempoh lanjutan sehingga akhir Januari 1997. Responden-responden telah menghantar draf cadangan dan jadual kadar/kos melalui surat bertarikh 11 September 1996. Ini diikuti oleh dua cadangan penyemakan semula bertarikh 20 September 1996 dan 25 September 1996.

Ketiga-tiga cadangan menyatakan bahawa 'this assignment shall be subordinated to the [TSA] …' dan responden-responden juga memberitahu perayu bahawa mereka tidak dapat mengekalkan kakitangan mereka bagi projek tersebut selepas 1 Oktober 1996 tanpa pengesahan bahawa mereka akan dibayar balik. Perayu mengesahkan melalui faksimili pada 1 Oktober 1996 dan menunjukkan bahawa mereka akan terus melibatkan perkhidmatan responden-responden 'on the same terms and conditions as detailed in the previous TSA'. Responden-responden telah mengemukakan cadangan keempat pada 14 Oktober 1996, dengan merujuk kepada perbincangan yang diadakan pada 14 Oktober 1996 yang menunjukkan subordinasi tugasan kepada TSA. Keesokan harinya, perayu mengesahkan penglibatan responden-responden dan meminta mereka mengemukakan cadangan yang diubahsuai. Responden-responden patuh dan rujukan kepada tugasan yang disubordinasi kepada TSA masih dibuat. Walau bagaimanapun, dalam cadangan keenam yang telah dihantar pada 31 Oktober 1996, tiada pernyataan terhadap subordinasi kepada TSA yang dibuat. Peguam terpelajar untuk perayu berhujah bahawa perayu telah menerima cadangan keenam pada 2 November 1996, 4 November 1996 dan 5 November 1996. Perayu seterusnya menghujahkan bahawa pertikaian tersebut timbul bukan daripada pelaksanaan TSA tetapi daripada pelaksanaan cadangan keenam di mana tiada perjanjian timbang tara. Sebaliknya, responden-responden berhujah bahawa terma-terma dan syarat-syarat TSA adalah terpakai kerana perayu telah menerima cadangan ketiga. Isu di hadapan Mahkamah Rayuan adalah sama ada fasal timbang tara dalam TSA terpakai kepada tempoh lanjutan perkhidmatan projek.

Diputuskan, menolak rayuan dengan kos:

(1) Perjanjian tersebut dicapai sedikit demi sedikit. Hanya terdapat satu cadangan kerana cadangan-cadangan yang timbul adalah semakan kepada satu cadangan untuk memasukkan butiran dan isi-isi kecil yang lain yang dipersetujui dalam rundingan berterusan kerana responden-responden telah terus menerus menyediakan perkhidmatan projek luar TSA tanpa perjanjian formal. Dokumen-dokumen yang apabila diambil milik dan dianggap menandakan bahawa pihak-pihak mempunyai pemahaman bahawa perkhidmatan projek bagi tempoh yang dilanjutkan telah disubordinasikan kepada TSA. Oleh itu, perayu telah diestop daripada menafikan perjanjian timbang tara. Tanpa mengira ketiadaan klausa subordinasi tersebut dalam cadangan yang keenam, gambaran besarnya adalah bahawa perayu telah bersetuju kepada timbangtara (lihat perenggan 13–14).

(2) Walau bagaimanapun, ketiadaan fasal subordinasi dalam cadangan keenam tidak membantu perayu. Pertikaian timbul, sama ada sebahagiannya atau kesemuanya, daripada pelaksanaan perkhidmatan projek bagi tempoh lanjutan dari Oktober 1996 hingga 16 Januari 1997

di bawah lima cadangan pertama di mana jelas terdapat suatu akuan bertulis oleh perayu mengenai timbang tara. Pertikaian yang jelas di bawah perjanjian timbang tara dalam TSA sepatutnya dibawa untuk timbang tara, sama seperti perayu telah bersetuju secara nyata dengan responden-responden (lihat perenggan 15–17).]

Notes:

For cases on dismissal, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1808–1809.

Cases referred to

Bauer (M) Sdn Bhd v Daewoo Corp [1999] 4 MLJ 545, CA (refd)

Legislation referred to

Arbitration Act 1952 (repealed by the Arbitration Act 2005) ss 2, 6

Darryl Goon (Raja, Darryl & Loh) for the appellant.
Rodney Gomez (Shearn Delamore & Co) for the respondents.

Jeffrey Tan JCA (delivering judgment of the court):

[1] In the court below, from the learned senior assistant registrar, the defendant (respondent in this appeal) obtained a stay of proceedings pursuant to s 6 of the Arbitration Act 1952 (since repealed by the Arbitration Act 2005 which came into force on 16 March 2006) which provided that 'If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings'.

[2] Against that order, the plaintiff (appellant in this appeal) appealed, since unsuccessfully to judge in chambers and thence to this court.

[3] In relation to the background facts, it is only necessary to relate that by a technical services agreement ('TSA') dated 30 July 1996 and entered into between the appellant of the one part and the respondents of the other part, the respondents agreed to provide the 'project services' described in Appendix A (see p 726 of the appeal record) of the TSA for the appellant's project at

Mentakab, Malaysia. It is not in dispute (see para 7 of 174AR, and para 8 of 206AR) that article XIII of the TSA provided that any dispute arising between the parties 'shall be resolved through good faith negotiations' and that 'if the dispute is not resolved to the mutual satisfaction of both parties within thirty (30) days or such longer time as is mutually agreed (then) the parties will attempt to resolve the dispute through the process of mediation' (see 723AR).

[4] The said article XIII further provided as follows:

> If mediation fails, (the parties) agree to submit any such dispute or claim arising out of or relating to this agreement or breach thereof to arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance these rules. The arbitration proceedings shall be held in Kuala Lumpur, Malaysia, and shall be conducted in the English language. Judgment upon any award rendered may be rendered in any court having jurisdiction or application may be made to such court for a judicial acceptance of the award or an order of enforcement, as the case may be.

[5] The said project services were due to end on 30 September 1996. But before that, the parties entered into negotiations in September 1996 to extend the period of service to the end of January 1997. 'Sixth proposals' were submitted by the respondents on the extension of the period of service. In the first five proposals (see 736–743AR, 745–751AR, 753–759AR, 766–776AR, and 784–791AR) the respondents stipulated that:

> … this assignment shall be subordinated to the (TSA) and adhere to the same conditions apart from the Appendix A, regarding scope of services and Appendix B, regarding the rate to be invoiced for the team members. The new scope of work is defined above. The proposed hourly are base wages times a multiplier of 2.2, as shown in the above 'MNI Extension, Estimated Cost' chart. The charges and costs will be invoiced monthly in arrears as specified in our current agreement.

[6] Counsel for the appellant particularly underlined that that latter stipulation was not in the '6th proposal' of the respondents dated 31 October 1996 (see 795–809AR). According to the appellant, it was the 'sixth proposal' that was accepted by the appellant on 2 November 1996, 4 November 1996, and 5 November 1996 (see 811–812AR, 816R, and 818–819AR). On account of that (the absence of that aforesaid stipulation in the sixth proposal) the appellant contended that there was no arbitration agreement between the parties. The appellant further contended that the dispute arose not from performance of the TSA but from performance of the sixth proposal where there was no arbitration agreement, and that the arbitration agreement in the TSA had nothing to do with the project services under the sixth proposal. That was the long and short of it, of the case of the appellant to dispute the arbitration agreement. On the other hand, the respondents contended that the

third proposal was accepted by the appellant and that the terms and conditions of the TSA applied to the extended period.

[7] Evidently, the issue before us is whether the arbitration clause in the TSA applied to the project services for the extended period. We were so invited, but we should not answer that issue on the basis of a single document. 'One swallow does not a summer make, nor one fine day; similarly one day or brief time of happiness does not make a person entirely happy' (Aristotle). We should examine all the contemporaneous documents, just as the learned judge below had so painstakingly done, to find the presence or absence of that alleged arbitration agreement (see *Bauer (M) Sdn Bhd v Daewoo Corp* [1999] 4 MLJ 545, where it was held by Gopal Sri Ram JCA, as he then was, delivering the judgment of the court, that the agreement to arbitrate may be gathered from either a single document or a series of documents). And from our examination of the contemporaneous documents, we find the following.

[8] By letter dated 11 September 1996 (see 736AR), the respondents first forwarded a draft proposal on the extension of the project services (see 737–741AR) together with a schedule of the rates/cost (see 742–743AR). Then by two further letters dated 20 September 1996 (see 745AR) and 25 September 1996 (see 753AR), the respondents forwarded two 'revised' proposals on the extension of the project services (see 746–749AR, and 754–757AR) together with schedules of the rates/cost (see 750AR and 758AR). All three 'proposals' clearly stated that '… this assignment shall be subordinated to the [TSA] …'. In the ultimate sentence of that letter dated 25 September 1996, the respondents advised the appellant that 'we [Respondents] are not able to maintain our personnel on the project beyond October 1, without a confirmation that we will be reimbursed' (see 753AR). On 1 October 1996, the appellant replied, now quoted verbatim, as follows:

> We apologize for the continued change in direction by MNI but look forward to negotiating a mutually acceptable arrangement for the next few weeks and discussing the longer term options with you whilst you are here in KL next week, and trust that this fax is sufficient confirmation of our continuing to engaging Bechtel/BE & K (*on the same terms and conditions as detailed in the previous Technical Services agreement*) for this extended period, and additional work already performed (ie the US50,000). Final invoicing will be based on approved invoices for actual costs of services and disbursements. (Emphasis added.) (see 764AR)

[9] It did not end at that. On 14 October 1996, the respondents submitted a 'fourth proposal', ostensibly to reflect 'the discussions held in Kuala Lumpur the week of 7/10/96' (see 766AR), that also clearly indicated that '… this assignment shall be subordinated to the [TSA] …'. A day later, that is on 15 October 1996, the appellant confirmed 'that B & BJV [are] to be engaged by MNI to complete the extended and expanded programme through to the

end of January 1997' (see 779AR), and requested the respondents 'to submit a modified proposal later this week together with the missing attachments. The modified proposal should separate out the packages that could be put to open bid without disrupting our cost and schedule' (see 779AR). Since so requested, the respondent then submitted, on 21 October 1996, another revised proposal to the appellant (see 784AR) that again indicated that '… this assignment shall be subordinated to the [TSA] …'.

[10] In the next letter by the respondents to the appellant dated 31 October 1996 (see 795AR), the respondent submitted the so-called 'sixth proposal'. And in that letter dated 31 October 1996, the stipulation on subordination to the TSA was not there.

[11] But that letter dated 31 October 1996 was not the entire embodiment of all that had transpired or had been agreed between the parties. When the TSA was about to expire and so it would seem at the behest of the appellant, the respondents forwarded to the appellant a draft proposal on the extension of the project services 'from October 3 to December 25, 1996' (see 737AR). That proposal was later revised by letters dated 20 September 1996 (see 745AR) and 25 September 1996 (see 753AR); inter alia, the proposed extension of the project services was revised to 'from October 1 to October 31, 1996' (see 754AR), with the advice from the respondents to the appellant that the personnel of the respondents would not be maintained on the project beyond 1 October without the prior confirmation by the appellant that the respondents would be reimbursed. On 1 October 1996, the appellant suitably confirmed that the respondents would be engaged 'on the same terms and conditions as detailed in the previous Technical Services agreement for this extended period'.

[12] The extended period was however again revised. By letter dated 14 October 1996, the respondents stated that, the extended period was changed to the end of January 1997 and that several other details were to be included to whatever had been proposed. By letter dated 15 October 1996, the appellant then invited the respondents to submit a modified proposal that would include some missing attachments, and also again confirmed that the respondents were the project services provider for the extended period. Then finally, on 25 October 1996 and 31 October 1996, the respondents submitted the last two revisions of the proposal.

[13] But in truth, there was only one proposal. The so called proposals that later came about were really revisions of that one proposal, to incorporate such details and other fine points agreed to in the course of ongoing discussions/negotiations, whilst as the respondents continued to provide the project services beyond the TSA without a formal agreement. In relation to

some details, agreement was reached bit by bit, so to speak. But in relation to the main terms, agreement was reached with alacrity. Project services were first extended to the end of October 1996, then to the end of January 1997, and then to the end of July 1997. All cost/rates were agreed. The appellant also agreed that 'the assignment shall be subordinated to the TSA'. Subordination to the TSA was first expressly agreed to by the appellant by its letter dated 1 October 1996. And subordination to the TSA was implicitly agreed to by the appellant by its letter dated 15 October 1996, where the appellant again accepted the revised (the so-called fourth) proposal which stated that '… this assignment shall be subordinated to the [TSA] …'. Thus, by the time that the proposal was further revised by the so-called fifth and sixth proposals, there was already clear agreement that the project services for the extended period would be subordinated to the TSA. That arbitration agreement was not affected by the so-called fifth proposal, which was a revision to include missing attachments and the manner of execution of the project services, and or by the so-called sixth proposal which further extended the project services from November 1996 to the end of July 1997. Those so-called fifth and or sixth proposals affected not the express agreement on subordination to the TSA.

[14] On the basis of the aforesaid documents when taken and considered as a whole, we could only agree with the learned judge who held that both parties had always conducted themselves on the understanding that the project services for the extended period were subordinated to the TSA, and that the appellant was estopped from denying the arbitration agreement. Notwithstanding the absence of the said subordination clause in the so-called sixth proposal, the big picture was that the appellant had agreed to arbitration.

[15] To the grounds of the learned judge, we wish to append that in any event the fact of the absence of the subordination clause in the so-called sixth proposal could not come to the assistance of the appellant. The appellant's claim against the respondents was for breach of contract, breach of statutory duty, and or negligence (see 121AR). Paragraph 17 of the statement of claim (see 118AR) pleaded that the said contract was constituted by documents that included 'the proposal for October work'. Paragraph 18.2 of the statement of claim (see 118AR) pleaded that the contract was for the period 1 October 1996 to 31 October 1996. And para 24(h) of the statement of claim (see 123AR) pleaded that the respondents were negligent in their default to take heed of a letter dated 16 January 1997. Contrary to what was contended, it was the pleaded case of the appellant that the dispute arose, whether partly or wholly, from performance of the project services for the period October 1996 to 16 January 1997.

[16] But we observe that in relation to the 'October work', the only proposal/s that touched upon that period were the so-called second, third and

fourth proposals which all clearly stated '… this assignment shall be subordinated to the TSA …'. And in relation to the alleged negligence of the respondents in January 1997, the only so-called proposal that touched upon the period of January 1997 was the so-called fifth proposal (see 786AR) which also clearly stated '… this assignment shall be subordinated to the TSA …'.

[17] We clearly see that the dispute arose, whether partly or wholly, from performance of project services for the extended period from October 1996 to 16 January 1997 under the first five 'proposals', where there was a clear written submission by the appellant (see 764AR and 779AR) to arbitration (on the requirement of a written submission to arbitration, see s 2 of the AA 1952). The dispute, which was clearly caught by the arbitration agreement in the TSA, should have been submitted to arbitration, just as the appellant had expressly agreed with the respondents.

[18] For the aforesaid reasons, we unanimously dismiss this appeal with costs and affirm the order staying the proceedings.

Appeal dismissed with costs.

Reported by Ibnu Aswan